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Time To Update Arbitration Agreements—Mandatory Arbitration Is Again Permissible in California

California employers with employees and job applicants subject to the Federal Arbitration Act (FAA) can once again require such individuals to sign arbitration agreements as a condition of employment.

On February 15, 2023, the U.S. Court of Appeals for the Ninth Circuit reviewed California's Assembly Bill 51 (AB 51), which Governor Newsom approved in October 2019, creating a law limiting so-called "forced arbitration" between employees and their employers. In a 2-1 decision by a three-judge panel, the court affirmed the district court's grant of a preliminary injunction, which barred enforcement of AB 51 with respect to arbitration agreements governed by the FAA. After reconsidering the case, the Ninth Circuit held that the FAA preempts AB 51.

This decision reinforces the strong federal policy favoring arbitration and permits employers whose employees are subject to the FAA to require arbitration as a condition of employment. While valid mandatory arbitration agreements that are expressly subject to the FAA are once again permissible in California, they remain subject to general contract defenses that exist under state law. And, while most employees are arguably subject to the FAA, there are express exceptions for contracts of employment for classes of workers engaged in foreign or interstate commerce. Given the ever-changing legal landscape surrounding arbitration, California employers who wish to enter into arbitration agreements with their employees and job applicants should contact experienced counsel to discuss whether the FAA applies as well as strategy and implementation.

Authors

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